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Nos. 86-939 and 86-941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ENERGY TRANSPORTATION SYSTEMS, INC.,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS THE KANSAS CITY SOUTHERN RAILWAY COMPANY, THE SIERRA CLUB, AND THE IOWA, NEBRASKA AND ROCKY MOUNTAIN CHAPTERS OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA

WILLIAM E. WALTERS, III *
WALTERS & THEIS
2015 York Street
Denver, Colorado 80205
Attorney for the Iowa, Nebraska and Rocky Mountain Chapters of the Farmers Educational and Cooperative Union of America

RODNEY M. CONFER
KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
Of Counsel

STEPHEN E. ROADY *
ANDREWS & KURTH
1730 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20006
(202) 662-2700
Attorney for The Kansas City Southern Railway Company

RONALD J. WILSON *
SIERRA CLUB LEGAL DEFENSE FUND
1516 P Street, N.W.
Suite 300
Washington, D.C. 20005
Attorney for The Sierra Club

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Flood Control Act of 1944, which explicitly authorizes only the Secretary of the Army to execute contracts for the industrial use of water from main stem Missouri River reservoirs, implicitly authorizes the Secretary of the Interior to enter into a contract for use of the same water without prior approval from the Army.

LIST OF PARTIES

The following parties were plaintiffs in the District Court and appellees in the Eighth Circuit on the issue of the Secretary of the Interior's authority under the Flood Control Act of 1944: the States of Missouri, Iowa and Nebraska, The Kansas City Southern Railway Company ("KCSR"), The Sierra Club and the Nebraska, Iowa and Rocky Mountain Chapters of the Farmers Educational and Cooperative Union of America.

The parties who were defendants in the District Court and appellants in the Eighth Circuit on the issue of the Secretary of the Interior's authority under the Flood Control Act of 1944 are listed in the petitions. However, by letter dated January 27, 1987, ETSI, Inc., the only petitioner in No. 86-939, advised the Clerk that it had been dissolved and requested that ETSI Pipeline Project be substituted in its place.

LIST OF PARENT COMPANIES AND AFFILIATES

The KCSR is a wholly-owned subsidiary of Kansas City Southern Industries, Inc. KCSR is affiliated with the Louisiana and Arkansas Railway Company.

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BRIEF IN OPPOSITION OF RESPONDENTS THE KANSAS CITY SOUTHERN RAILWAY COMPANY, THE SIERRA CLUB, AND THE IOWA, NEBRASKA AND ROCKY MOUNTAIN CHAPTERS OF THE FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA

Respondents The Kansas City Southern Railway Company ("KCSR"), The Sierra Club, and the Iowa, Nebraska and Rocky Mountain Chapters of the Farmers Educational and Cooperative Union of America (hereinafter collectively "private party respondents") respectfully request this Court to deny the petitions for a writ of certiorari to review the judgment of the United

States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the District Court is reported at 787 F.2d 270. The District Court opinion is reported at 586 F.Supp. 1268.

STATUTES INVOLVED

Sections 1 and 9 of the 1944 Flood Control Act are set out by the petitioners. The correctness of the decision below is made obvious by the language of Sections 6 and 8 of that Act as well. Those sections are set out here:

> Sec. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department; *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.
>
> Sec. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent

specific authorization of the Congress by an authorization Act; and within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the costs of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dām or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

STATEMENT OF THE CASE

This case arises from an attempt by the Department of the Interior to usurp authority over the main stem of the Missouri River which was granted to the Department of the Army in the Flood Control Act of 1944. That Act responded to the twin concerns of protecting the lower Missouri River Basin from flooding along the River's main stem, while allowing irrigation uses of water in the upper Missouri Basin. The Act resolved conflicts between the Department of the Army's Corps of Engineers and the Department of the Interior's Bureau of Reclamation.

Specifically, the Act granted to the Army Secretary authority to develop, operate and maintain each reservoir to be built on the main stem of the Missouri. In Section 6 of the Act, the Congress stated that this authority included the authority to market water from the main stem reservoirs for industrial use. (Pet. App. 81a-82a.) At the same time, the Act granted to the Secretary of the Interior authority to develop, operate and maintain a number of reservoirs to be built on various tributaries to

the Missouri. In Section 9 of the Act, the Congress made federal reclamation law applicable to those reservoirs constructed by Interior. (Pet. App. 83a.)

Significantly, in crafting this compromise, the Congress on two occasions rejected language that would have provided authority for Interior to market water for industrial use from the main stem reservoirs developed and operated by the Army. At one stage, the Congress refused to adopt an amendment to Section 6 proffered by the Interior Secretary, rejecting his effort to claim industrial marketing authority at main stem reservoirs. (See Pet. App. 28a-29a.) At another, Congress struck language from Section 8 which would have granted the Interior Secretary some authority to manage water stored in main stem reservoirs. (See Pet. App. 25a-28a). Instead, Congress substituted the current language, which explicitly limits the power of the Interior Secretary over water at those reservoirs to the management of only that water which is to be used in connection with irrigation works. (Pet. App. at 82a-83a.)

The two agencies operated consistent with this clear division of authority between the Army Department and the Interior Department for over thirty years, during which time Interior never sought to exercise the authority it now claims, nor developed regulations which would have implemented any such authority. In 1957, for example, the Interior Department advised the Congress that it did not consider the main stem reservoirs of the Missouri to be "reclamation developments," and therefore was not depositing hydroelectric revenues derived from the operation of main stem reservoirs into its reclamation fund. (See Pet. App. 20a-21a.)

In 1958, the Congress provided the Army Secretary with another statutory vehicle for marketing water for industrial use when it enacted the Water Supply Act, 43 U.S.C. § 390b. Under the 1958 Act, the Army Secre-

tary can market water for industrial use so long as that process does not significantly affect project purposes. Under regulations promulgated by the Army pursuant to that Act, the Army Secretary may market up to 50,000 acre feet of water annually.[1]

During the energy crisis of the 1970's, Interior renewed its previously unsuccessful effort to obtain authority to market water for industrial use from Army reservoirs. Relying upon an internal, unpublished memorandum from its Solicitor in 1974 which baldly asserted the existence of that authority, Interior pressed Army to enter into a Memorandum of Understanding ("MOU") as part of a plan to divert main stem Missouri water for energy use.

The Army expressed grave reservations concerning Interior's claim of authority to engage in such marketing. In 1974, the Acting General Counsel of the Army disputed the Interior Solicitor's conclusion and advised the Army's Chief of Civil Functions that Interior lacked the authority to engage unilaterally in industrial water marketing from main stem reservoirs on the River. (See Pet. App. 10a-11a.)

After further negotiations between the two agencies, the MOU was signed in 1975. The MOU provided that Interior would act as agent for the Army and assume authority to market water for energy use from main stem reservoirs so long as each contract had prior Army approval. Shortly after signing the MOU, the Army Secretary wrote the Interior Secretary urging that they both seek clarification from the Congress over the authority question. After several extensions, the MOU lapsed in 1978. It has not been revived.

Notwithstanding the expiration of the MOU, on July 2, 1982 the Secretary of the Interior, claiming unilateral authority under Section 9(c) of the 1944 Flood Control Act, executed a water service contract with ETSI Pipe-

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[1] Corps of Engineers Project Purpose Planning Guidance, Regulation ER 1105-2-20, Section 7.3(b) (January 29, 1982).

line Project ("ETSI") without obtaining the approval of the Army Secretary. The contract would have allowed ETSI to take 20,000 acre feet of water per year from the Oahe Reservoir for use as a transportation medium for crushed coal in a proposed pipeline extending from the Powder River Basin in Wyoming to power plants in the mid-South. The private party respondents, along with the States of Missouri, Iowa and Nebraska (hereinafter "State respondents") then brought the instant proceedings challenging the contract on several grounds in federal court.

On May 3, 1984, Chief Judge Warren K. Urbom of the United States District Court for the District of Nebraska ruled in favor of one argument advanced by both the private party and State respondents, concluding that the 1944 Flood Control Act did not provide the Interior Secretary authority to approve the ETSI contract. Accordingly, Judge Urbom entered summary judgment against the petitioners, permanently enjoining contract performance. ETSI, Inc. and the Interior Secretary appealed Judge Urbom's decision.[2]

On July 31, 1984, ETSI announced that it had terminated its project. The respondents then suggested that the appeals should be dismissed as moot or unripe. After remanding the proceedings to the District Court for an initial mootness determination, a split panel of the Eighth Circuit ruled that the case was not moot.

The Eighth Circuit issued its 2-1 decision on March 31, 1986 affirming Judge Urbom on the merits of the appeal. The Court of Appeals concluded that the purpose, plain language and legislative history of the 1944 Flood Control Act failed to provide authority for the Interior Sec-

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[2] After initially dismissing the private party respondents for lack of standing to challenge the Interior Secretary's authority, Judge Urbom vacated that decision and allowed them to participate in the appeals. The Eighth Circuit did not reach the issue of standing with respect to the private party respondents in its opinion below, and that issue is not raised here by the petitioners.

retary to enter unilaterally into the ETSI contract. An evenly divided Eighth Circuit denied rehearing on July 10, 1986.

SUMMARY OF THE ARGUMENT

This case does not merit review by the Court. It is correctly decided, and it has limited effect.

This case concerns the only contract ever signed by the Secretary of the Interior in his Department's effort to market water for industrial use from a main stem Missouri River reservoir absent prior Army approval. The project which required the contract has been terminated. The decision below closely follows the language of the 1944 Flood Control Act in enjoining the contract, and leaves available the Army procedures Congress clearly delineated in the 1944 Act for access to main stem Missouri River waters for industrial use.

The decision relies as well upon the legislative history of the 1944 Flood Control Act, which includes two flat rejections of amendments that would have granted the Interior Secretary authority like that he now claims. Given the clear assignment of industrial water marketing responsibility to the Army spelled out in the 1944 Act, the Court of Appeals properly refused to defer to Interior's assertion of implied competing authority. In so doing, the Court below remained faithful to the purpose of the Congress when it allocated the authority for Missouri River Basin projects between Army and Interior.

REASONS TO DENY THE PETITIONS

I. The Decision Below Is Limited Both In Scope And Effect Because The ETSI Project Has Been Terminated And Because That Project Was The Only Element Of Interior's Unilateral Water Marketing Program.

There are no broad questions of law presented by this case. To the contrary, given the current state of the facts, the decision below has a decidedly limited effect.

First, the ETSI contract enjoined in this action was the only contract ever entered into by the Secretary of the Interior under his plan to market water for industrial use from main stem Missouri River reservoirs without prior Army approval or authorization.[3] Apparently Interior's program is now dormant. Therefore, any ruling in this case would have no effect on any existing efforts by the Interior Secretary to implement that program.

Second, ETSI announced the termination of its project in July of 1984 and has not revived the project. Moreover, on July 31, 1984, ETSI terminated its agreement with the South Dakota Conservancy District for assignment of a water right from Oahe Reservoir and has not renewed that agreement. Indeed, ETSI, Inc., which was the corporate entity named to represent ETSI as a party below, has been dissolved.[4] Thus there is a real question whether this case presents any live controversy as to ETSI.

For these reasons, the decision raises no issue worthy of review by this Court.

II. The Decision Below Leaves Industrial Access To Main Stem Missouri River Water Undisturbed.

A. The Army Secretary Remains Authorized To Enter Into Industrial Water Marketing Contracts At Main Stem Missouri River Reservoirs.

The petitioners and *amici* argue that the decision below forecloses industrial access to water in main stem Mis-

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[3] The petitioners refer to three contracts for the industrial use of water from Missouri River main stem reservoirs which they claim could be affected by the decision below. However, each of these contracts was entered into following the procedures adopted in the MOU. Thus, the Eighth Circuit correctly found that the ETSI contract is the only example of Interior's assertion of authority under the 1944 Act without prior approval by the Army. (See Pet. App. 11a.)

[4] ETSI, Inc. advised the Clerk of this Court that it had been dissolved by letter dated January 27, 1987.

souri River reservoirs. This argument largely ignores the Secretary of the Army's ability to market industrial water from those very reservoirs.

The government attempts to minimize the fact that access to industrial water on the Missouri is available through the Army by focusing solely on the Interior Secretary while conceding in a footnote that its petition raises no issue concerning Army's authority. Hodel Pet. at 12 n.13. ETSI briefly describes Army's authority, but suggests that it is insufficient despite the fact that the Army enjoys power to make available water in the amounts the ETSI project required. ETSI Pet. at 20 n.28.

In any event, the decision below leaves in place the Army's historical statutory ability to market water for industrial use either under Section 6 of the 1944 Flood Control Act, 58 Stat. 890 (codified at 33 U.S.C. § 708), or under the 1958 Water Supply Act, 43 U.S.C. § 390b (b). Under that Army authority, if the ETSI project were still alive, there would be nothing to prevent it from applying, or from fostering an application, to the Army for the water service it requires.

In fact, after entry of the ruling below by the District Court, the State of South Dakota filed precisely such an application on ETSI's behalf with the Army Corps of Engineers, invoking the 1958 Act. The Corps immediately began processing that application, and halted the process only upon termination of the ETSI project. The fact that the petitioners availed themselves of existing Army procedures competely belies their suggestion here that the decision below "locks up" the water in Oahe reservoir and prevents industrial use.[6]

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[6] The petitioners' additional suggestion that marketing water for industrial use by Army rather than by Interior would adversely affect the government's ability to recoup costs is likewise incorrect. Both Section 6 of the 1944 Flood Control Act, and the 1958 Water

B. Previous Contracts Entered Into By The Interior Secretary With Prior Army Approval Are Unaffected By The Decision.

Given the admitted existence of Army authority which provides adequate procedures for industrial use of main stem Missouri River water,[6] the Secretary of the Interior can only argue that the decision below should be reviewed merely because he has entered into other "similar" contracts, and "may wish to execute other such contracts in the future." Hodel Pet. at 13. As noted earlier, however, the Court of Appeals correctly determined that the ETSI contract is the *only* contract for industrial water use from Army reservoirs on the Missouri River ever entered into unilaterally by the Interior Secretary. (See Pet. App. 11a.) Accordingly, the decision below has no effect on other contracts.

Additionally, to the extent the Interior Secretary believes that his Department should be involved in industrial water service contracts at main stem Missouri River

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Supply Act, contemplate that the Army will require payment for industrial water use. In fact, in Section 932 of the Water Resources Development Act of 1986, the Congress recently reaffirmed its intention that Army recoup costs for industrial water use. 132 Cong. Rec. H11511 (October 17, 1986); *see* 132 Cong. Rec. S2440 (March 11, 1986).

[6] Existing Army regulations under the 1958 Water Supply Act allow up to 50,000 acre feet of water to be marketed from Army reservoirs annually for industrial use. Corps of Engineers Project Purpose Planning Guidance, Regulation ER 1105-2-20, Section 7.3(b) (January 29, 1982). Respondents understand that changes in policy under Section 6 of the 1944 Act that would allow industrial marketing in even greater volumes are currently under review by the Army. The private party respondents note this recent development, as well as the Congressional action identified in the previous footnote, in order that the Court be fully apprised of matters that may affect the petitions. *See, Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238 (1985).

reservoirs, he remains free under the decision below to explore some new understanding with the Army Secretary, or to return to the Congress to seek the authority which Congress refused him in 1944. In any event, the fact that the Interior Secretary may wish at some future time to enter into other industrial water service contracts with entities who are not parties here surely provides no basis for this Court to review this case. *See, International Paper Co. v. Ouellette*, 55 U.S.L.W. 4138, 4146 (U.S. January 21, 1987) (Stevens and Blackmun, J.J., concurring in part and dissenting in part) (Court does not sit to draft advisory opinions for possible future guidance of other courts).

III. The Decision Below Is Correct On The Merits And Is Reasonable As A Matter Of Public Policy.

A. The Decision Is Fully Supported By The Plain Language And Legislative History Of The 1944 Flood Control Act, Which Denies The Interior Secretary Authority To Enter Into The ETSI Contract.

The Court of Appeals decision is clearly correct on the merits. It is fully supported not only by the plain language of the 1944 Flood Control Act, which sets out the allocation of authority in the Missouri River Basin between the Interior Secretary and the Army Secretary, but also by the legislative history of that Act.

Sections 6, 8 and 9 of the 1944 Act dictate that Army rather than Interior enjoys the authority to market water for industrial use from main stem Missouri River reservoirs. In brief, Section 6 provides that the Army Secretary shall have authority over all industrial water uses at reservoirs he controls. (Pet. App. 81a.) With respect to such Army-controlled reservoirs, Section 8 provides the Interior Secretary with authority over only such water and water works as are used in irrigation. (Pet. App. 82a-83a.) Finally, Section 9(c) triggers the

Interior Secretary's power under the reclamation laws only with respect to those projects which have been undertaken by him. Those projects do not include Oahe.[7] (Pet. App. 83a-84a.)

Therefore, because ETSI sought water for industrial use (not for irrigation), and because Oahe was built and is operated by the Army, the plain language of the 1944 Act simply does not grant the Interior Secretary authority to enter into the ETSI contract. Instead, the language of the Act directs those seeking Oahe water for industrial purposes to make their agreements with the Army. (See Pet. App. 18a-21a.)

Since the plain language of the statute dictates only one conclusion, that language governs. *United States v. Clark*, 454 U.S. 555, 560 (1982); *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978). Accordingly, the decision below was entirely correct, and it does not merit review.

Moreover, even if the language of the 1944 Flood Control Act were not so conclusive, the legislative history of the Act demonstrates without question that the Interior Secretary does not possess the authority he seeks. Specifically, during the deliberations attending passage of the 1944 Act, when confronted with then-Secretary Ickes' argument that Interior should be granted authority to enter into industrial water service contracts at reservoirs such as Oahe, Congress refused to accept his proposed amendment. (See Pet. App. 28a-29a). In addition, during those same 1944 deliberations, Congress deleted language proposed for Section 8 which would have granted the Interior Secretary broad authority to regulate water stored in Oahe. Instead, Congress substituted the current language of Section 8, which limits Interior's authority

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[7] The petitioners do not dispute that the Oahe Reservoir was constructed and is operated by the Army Department, rather than by the Interior Department.

over main stem reservoirs to regulation of water used in irrigation. (See Pet. App. 24a-28a.)

These actions by the 1944 Congress—actions that go unmentioned by the petitioners despite being central to the decision below—demonstrate that Congress considered and denied the very authority which the Interior Secretary now seeks.

B. The Decision Properly Declines To Defer To An Interpretation Of The 1944 Flood Control Act By The Interior Secretary Because That Interpretation Conflicts With The Act's Plain Language And Legislative History As Well As With A Contrary Interpretation By The Army.

The Interior Secretary and ETSI argue finally that the decision below should be reviewed for the reason that it undermines the concept of deference to agency interpretations of their empowering statutes articulated in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Hodel Pet. at 16; ETSI Pet. at 24-25. However, the decision below is fully consonant with *Chevron* and its progeny. It formulates no new deference principles, and it correctly applies existing law.

Contrary to the suggestion by ETSI, the decision below does not attempt to carve out a "jurisdictional issue" exception to deference. Instead, the Court of Appeals expressly relied upon *Chevron* to inform its analysis. (See Pet. App. 32a-33a.) As the court below correctly observed, *Chevron* and its progeny counsel deference when two conditions obtain: first, the agency offering the construction must enjoy the power to administer the provision it construes; second, the construction must be reasonable. Neither of these circumstances is found here.

As discussed earlier, Section 6 of the 1944 Flood Control Act clearly authorized the Army Department to market water for industrial use from main stem Missouri River reservoirs, and the 1944 Congress rejected

language which would have granted similar authority to the Interior Department. Thus, the 1944 Act simply does not empower Interior to market water for industrial use from Oahe Reservoir. Moreover, the internal memorandum by Interior's Solicitor prepared thirty years after the fact in 1974, and to which the petitioners insist deference is due, unreasonably ignored both the language of Section 6 and the legislative history of the 1944 Act. In addition, the Acting General Counsel of the Army expressly disagreed with the Solicitor's conclusion in a contemporaneous analysis prepared during 1974. Accordingly, this case simply presents no basis for deference under the reasoning of *Chevron*.

Each of the other cases relied upon by the petitioners is distinguishable on the same ground. Unlike this case, in each of the petitioners' cases the statute under review unequivocally empowered the agency offering the interpretation to administer the provision in question.[8]

For example, in the case cited prominently by ETSI, *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245 (1986), this Court deferred to an interpretation by the CFTC of its own enabling statute (the Com-

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[8] *See, Commodity Futures Trading Comm'n v. Schor*, 106 S.Ct. 3245, 3250 (1986) (review of CFTC interpretation of its own enabling act); *Young v. Community Nutrition Inst.*, 106 S.Ct. 2360, 2362, 2366 (1986) (review of interpretation by FDA of act which expressly vested interpretive power in FDA); *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 106 S.Ct. 1931, 1935, 1938-39 (1986) (review of FDIC interpretation of its enabling laws); *United States v. City of Fulton*, 106 S.Ct. 1422, 1426 and n.3, 1427-28 (1986) (review of Energy Secretary's interpretation of provision which unquestionably vested power in him); *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 457 and n.1 (1986) (review of Corps of Engineers interpretation of Clean Water Act provision which expressly empowered Corps to control permits affecting wetlands); *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 530-31 n.16 (1985) (review of interpretation by HHS Secretary of Medicaid provision under act which expressly provided interpretive authority to the Secretary);

modities Exchange Act) only after noting that the interpretation was a "longheld position" which was "well within the scope of its delegated authority." *Id.* at 3254. Similarly, in the one case relied upon by the Interior Secretary, *United States v. City of Fulton*, 106 S.Ct. 1422 (1986), this Court deferred to an interpretation of Section 5 of the 1944 Flood Control Act by the Secretary of Energy after emphasizing that there was no question concerning the existence of his authority to administer the section under review. *Id.* at 1426-1427. In this case, the existence of authority is precisely the question presented. For this reason, the Court of Appeals properly declined to defer to the Interior Secretary's unreasonable construction of the 1944 Flood Control Act.[9]

C. The Decision Furthers The Public Interest By Confirming The Procedures That Protect Existing Users Of Missouri River Water.

The decision below should remain undisturbed for an additional reason. Unlike the result which would obtain if the petitioners were to prevail, the decision below protects the rational division of authority between the Interior Department and the Army Department established by the 1944 Congress. Under the decision, those seeking water for industrial purposes from main stem Missouri River reservoirs can simply apply to the Army

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Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 118 n.2 (1985) (review of EPA interpretation of provision of Clean Water Act which expressly directed EPA to administer its terms).

[9] In a final attempt to persuade this Court of the need to review this case, the petitioners emphasize the even division of the Court of Appeals in denying rehearing. This argument of course overlooks the fact that there was no division whatever between the conclusions of both lower courts; the Court of Appeals affirmed the district court's conclusion on the merits. In any event, a closely-divided denial of rehearing does not provide a sufficient basis for certiorari. *See, Ratchford v. Gay Lib*, 434 U.S. 1080 (1978) (certiorari denied when court of appeals evenly split in denying rehearing).

under Section 6 of the 1944 Act (or under the 1958 Water Supply Act) rather than applying to the Secretary of the Interior under Section 9(c). Unlike the provisions of the reclamation laws which are triggered by Section 9(c), Section 6 requires the Army to consider the effect of the application upon existing users of water. The 1958 Act likewise protects against any significant changes in the operations or purposes of the affected reservoir as a result of industrial water diversions.

Thus, unlike Section 9(c), both the 1958 Act and Section 6 contain protections against excessive water depletion from main stem reservoirs of the Missouri. Allowing Interior to compete with Army for the marketing of water for industry from these reservoirs would upset the existing allocations of responsibilities which allow for smooth functioning of the two agencies in protecting all those who now depend upon the waters of the Missouri. For this reason, the decision below is not only correct, it is in the public interest.

CONCLUSION

For each of the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM E. WALTERS, III *
WALTERS & THEIS
2015 York Street
Denver, Colorado 80205
Attorney for the Iowa, Nebraska and Rocky Mountain Chapters of the Farmers Educational and Cooperative Union of America

RODNEY M. CONFER
KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
Of Counsel

STEPHEN E. ROADY *
ANDREWS & KURTH
1730 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20006
(202) 662-2700
Attorney for The Kansas City Southern Railway Company

RONALD J. WILSON *
SIERRA CLUB LEGAL DEFENSE FUND
1516 P Street, N.W.
Suite 300
Washington, D.C. 20005
Attorney for The Sierra Club

* Counsel of Record